SUPREME COURT, U. S.
FILED
OCT 12 1971

IN THE

Supreme Court of the United States

October Term, 1971.

No. 71-374.

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

v.

JAMES C. McCLOSKEY, PAUL J. MARZULLO, and THOMAS TAYLOR,
Respondents.

BRIEF OF RESPONDENT JAMES C. McCLOSKEY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

HOWARD GITTIS,
STEVEN A. ARBITTIER,
Attorneys for Respondent James C. McCloskey.

Of Counsel:
WOLF, BLOCK, SCHORR and SOLIS-COHEN,
12th Floor, Packard Building,
Philadelphia, Pennsylvania 19102

International, 711 Sc. 50th St., Phila., Pa. 19143—Tel. SA 7-4711 Area Code 215

I. OPINIONS BELOW.

The citation in the petition for writ of certiorari to an order refusing reargument is misleading. Neither petitioner nor respondent petitioned for reargument. Reproduced in the appendix hereto is a letter dated June 16, 1971 giving notice of the denial of certain petitions for reargument filed by others. No other petitions for reargument were filed.

II. JURISDICTION.

The Court lacks jurisdiction because the petition for writ of certiorari was not filed in time and the judgment of the Supreme Court of Pennsylvania was based on an independent and adequate state ground.

III. ARGUMENT.

1. The Petition Is Not Timely.

A petition for writ of certiorari to review a state court judgment in a criminal case must be filed within ninety days after the entry of such judgment. *Rules of the Supreme Court of the United States*, Rule 21. This period may be extended only by a justice of this court for good cause shown. *Ibid.*

In the present case, petitioner seeks review of the order of the Supreme Court of Pennsylvania quashing indictments against respondent. This order was entered on May 13, 1971. The present petition was filed on September 13, 1971, one hundred twenty-three days after the entry of the order.

The filing of petitions for reargument by other defendants does not cure this fatal flaw. The undisputed fact

is that neither this respondent, nor any of the other respondents named in the petition for writ of certiorari, filed a petition for reargument. There was no reason for them to do so because the order of the Supreme Court of Pennsylvania *upheld* the quashing of their indictments. Petitioner, as the party aggrieved by that order, could have petitioned for reargument but did not.

Certain defendants [1] whose cases were argued before the Supreme Court of Pennsylvania at the same time as respondent's did petition for reargument. The only issue raised by these defendants was that the quashing of their indictments should have been upheld because they were denied a preliminary hearing. The Supreme Court of Pennsylvania disagreed and entered an order dismissing the petitions for reargument.[2] Petitioner is not seeking review of this order and, therefore, the date on which it was entered is irrelevant.

Furthermore, the preliminary hearing issue is totally distinct from the issues of right to counsel and privilege against self-incrimination which form the basis of the quashing of respondent's indictments. Compare parts II and III of the Opinion of the Supreme Court of Pennsylvania, Appendix to Petition for Certiorari, pp. 48a-64a; 64a-70a. The filing of petitions for reargument by unrelated defendants raising completely different legal issues cannot extend petitioner's time for filing a petition for writ of certiorari

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1. McCormack-Taylor Associates, H. H. Robertson Company, and Frank M. Steinberg petitioned for reargument. McCloskey & Co., Inc. (the only defendant company with which respondent was associated) did not petition for reargument.

2. The reinstatement of the indictments against these defendants is the subject of petitions for writs of certiorari which were timely filed. See Petitions for Writ for Certiorari of McCloskey & Co., Inc. and McCormack-Taylor Associates (October Term, 1971, No. 71-201) and Petition for Writ of Certiorari of Frank M. Steinberg (October Term, 1971, No. 71-153).

with this court. *Cf., F. T. C. v. Minneapolis-Honeywell Regulator Co.,* 344 U. S. 206 (1952), 73 S. Ct. 245.

2. There Is an Adequate and Independent Non-federal Ground for the Judgment of the Supreme Court of Pennsylvania.

In its opinion, the Supreme Court of Pennsylvania framed the issue involved in the present case as follows:

> "[W]hether, or to what degree, a subpoenaed witness and potential defendant before an investigating grand jury is entitled to the assistance of counsel to aid him in asserting his right against self incrimination guaranteed both by the Fifth Amendment, applied to the states through the Fourteenth Amendment, *and Article I, Section 9 of the Pennsylvania Constitution.*"[3] (Emphasis added.) Appendix to Petition for Writ of Certiorari, p. 40a.

Thus, the Supreme Court of Pennsylvania expressly recognized that its holding was based on the privilege against self-incrimination provided in both the federal and state constitutions.

This court from the time of its foundation has adhered to the principle that it will not review state court judgments that rest upon adequate and independent state grounds. *Herb v. Pitcairn,* 324 U. S. 117, 125, 65 S. Ct. 459, 463 (1945). Indeed, when it appears that the judgment *might* have rested upon a non-federal ground, this court will not take jurisdiction to review that judgment. *Durley v. Mayo,* 351 U. S. 277, 281, 76 S. Ct. 806, 809 (1956).

A case directly in point is *Jankovich v. Indiana Toll Road Commission,* 379 U. S. 487, 85 S. Ct. 493 (1965). In

3. Article I, Section 9 of the Pennsylvania Constitution provides in relevant part: "In all criminal prosecutions, the accused . . . cannot be compelled to give evidence against himself . . . ."

that case, the Supreme Court of Indiana had invalidated a zoning ordinance on the ground that it effected a taking of private property in violation of the just compensation requirement of the Indiana Constitution and the due process clause of the Fourteenth Amendment to the United States Constitution. This court, after granting certiorari, dismissed the writ as improvidently granted on the ground that the Indiana constitutional provision was an independent and adequate ground for decision thereby depriving this court of jurisdiction. This decision was reached notwithstanding the fact that the Indiana Supreme Court had not analyzed separately the effect of the two constitutional provisions.

IV. CONCLUSION.

For the foregoing reasons, respondent respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

HOWARD GITTIS,
STEVEN A. ARBITTIER,
Attorneys for Respondent
James C. McCloskey.

Of Counsel:
WOLF, BLOCK, SCHORR
AND SOLIS-COHEN,
12th Floor Packard Building,
Philadelphia, Pennsylvania 19102

Supreme Court of Pennsylvania

Eastern District

PATRICK N. BOLSINGER
PROTHONOTARY
GEORGE W. DUNN, JR.
DEPUTY PROTHONOTARY

PHILADELPHIA. 19107

June 16, 1971

Thomas J. Mullaney, Esq., 405 Witherspoon Building, 1321 Walnut Street, Philadelphia, Pennsylvania 19107
and
Henry T. Reath, Esq., Duane, Morris & Heckscher, 1617 Land Title Building, Philadelphia, Pennsylvania 19110
and
Donald J. Goldberg, Esq., Suite 1208, One N. 13th Street, Philadelphia, Pennsylvania 19107

In Re: Commonwealth of Pennsylvania, Appellant
vs. James C. McCloskey, et al.
No. 157, January Term, 1971

Gentlemen:

This is to advise that the following Order has been endorsed on each of the Petitions for Reargument, filed on behalf of Appellees, McCormick-Taylor Associates, H. H. Robertson Company, and Frank M. Steinberg, in the above captioned case:

"14 June 1971.

Petition denied.

s/ Per Curiam."

Very truly yours,

Patrick N. Bolsinger
Prothonotary

PNB:ENT

cc: John Rogers Carroll, Esq., c/o Arlen Specter, District Atty., 666 City Hall, Philadelphia, Pa. 19107
cc: James D. Crawford, Esq., Deputy Dist. Attorney, 666 City Hall, Philadelphia, Pa. 19107
cc: Howard Gittis, Esq.,Wolf, Block, Schorr & Solis-Cohen, 12th Flr. Packard Bldg., Philadelphia, Pa. 19102
cc: James Francis Lawler, Esq., Ostroff & Lawler, 37 S. 20th St., Philadelphia, Pa. 19103
cc: Louis M. Natali, Jr., Esq., Dilworth, Paxson, Kalish & Levy, 2600 The Fidelity Bldg., Philadelphia, Pa. 19109
cc: John Patrick Walsh, Esq., Walsh & Savitt, 1410 Girard Trust Bldg., Philadelphia, Pa. 19102
cc: Edwin P. Rome, Esq., 4 Penn Center Plaza, Philadelphia, Pennsylvania 19103